

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARIO NEAL,

Plaintiff,

Case No. 17-13170

v.

Hon. John Corbett O'Meara

CITY OF DETROIT POLICE
DEPARTMENT and ARIC TOSQUI,

Defendants.

**ORDER GRANTING IN PART DEFENDANTS'
MOTION TO DISMISS, ALLOWING AMENDMENT
OF COMPLAINT AND EXTENDING TIME FOR SERVICE**

Before the court is Defendants' motion to dismiss Plaintiff's complaint, filed December 5, 2017. Plaintiff responded on December 11, 2017; Defendants did not file a reply brief.

Defendants contend that Plaintiff's complaint should be dismissed because they were not properly served with the summons and complaint. Defendants also assert that dismissal is appropriate because the City of Detroit Police Department is not a legal entity subject to suit.

Plaintiff filed his complaint on September 27, 2017, along with an application to proceed *in forma pauperis*. On October 18, 2017, the court granted Plaintiff's application and directed the Clerk of the Court to issue the summons.

The court also directed the U.S. Marshal to serve the summons and complaint upon Defendants Aric Tosqui and the City of Detroit Police Department.

On November 13, 2017, the City of Detroit Department of Civil Rights, Inclusion, and Opportunity (“CRIQ”) received a package addressed to Aric Tosqui, which contained the summons and complaint. The package was sent via Federal Express. CRIQ was not authorized to accept service for Tosqui and it does not appear that Tosqui was properly served in the manner required by Federal Rule of Civil Procedure 4(e) (e.g., personal service or certified mail under Michigan law). See also M.C.R. 2.105. Defendants also allege that the City of Detroit Police Department has not been served.

Pursuant to Federal Rule of Civil Procedure 4(m),

If a defendant is not served within 90 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Id. When the court allows a plaintiff to proceed *in forma pauperis*, it must order that service be made “by a United States marshal or deputy marshal or by a person specially appointed by the court.” Fed. R. Civ. P. 4(c)(3). A plaintiff proceeding *in forma pauperis* should not be penalized if the U.S. Marshal fails to properly effectuate service pursuant to Rule 4. Such circumstances constitute “good cause”

under Rule 4(m) and obligate the court to extend the time for service. See Byrd v. Stone, 94 F.3d 217 (“[T]he utter failure of the clerk and the Marshals Service to accomplish their respective duties to issue and serve process for plaintiff proceeding in *forma pauperis* constitutes a showing of good cause under Fed. R. Civ. P. 4.”).

Service via Federal Express does not comply with Rule 4. In light of Plaintiff’s *in forma pauperis* status, however, there is good cause to extend the time for service. Defendants’ counsel shall provide addresses for Aric Tosqui and the City of Detroit to the court so that proper service may be effectuated.

The court will grant Defendants’ motion to dismiss the City of Detroit Police Department because it is an entity that is not subject to suit. See Pierzynowski v. Police Dept. City of Detroit, 941 F. Supp. 633, 637 n.4 (E.D. Mich. 1996). Mindful of Plaintiff’s pro se status, however, the court will allow Plaintiff to amend his complaint to substitute the proper party, which is the City of Detroit. Id.

IT IS HEREBY ORDERED that Defendants’ motion to dismiss is GRANTED IN PART.

IT IS FURTHER ORDERED that Plaintiff shall file an amended complaint substituting the City of Detroit for the City of Detroit Police Department by

February 1, 2018.

IT IS FURTHER ORDERED that Defendants' counsel shall provide addresses to the court by **February 1, 2018**, for Aric Tosqui and the City of Detroit so that the U.S. Marshal is able to effectuate proper service pursuant to Rule 4.

IT IS FURTHER ORDERED that the time for service is extended until **March 30, 2018**, and that the U.S. Marshal shall serve the original and amended complaints on Aric Tosqui and the City of Detroit pursuant to Rule 4, without prepayment of the usual costs for such service.

s/John Corbett O'Meara
United States District Judge

Date: January 19, 2018

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, January 19, 2018, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager